

CAUSE NO. _____

THE CITY OF LEWSIVILLE,

Plaintiff,

v.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,*Defendant.*§
§
§
§
§
§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2015 JUN 18 AM 8:00
CHIEF CLERK'S OFFICE

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CITY OF LEWISVILLE, ("Plaintiff" or "Lewisville"), and files this its Original Petition against the Texas Commission on Environmental Quality, hereinafter ("Commission" or "TCEQ"), and for cause of action would respectfully show the Court as follows:

I. JUDICIAL REVIEW

The City of Lewisville, has been affected by a decision and act by the Executive Director of the Texas Commission on Environmental Quality, and files this petition for review under Texas Water Code § 5.351 to set aside the act of the Commission.

II. DISCOVERY CONTROL PLAN

This case is an appeal of an action of an administrative agency that occurred outside of the contested case process of Chapter 2001, TEX. GOV'T CODE. The case, therefore, should be controlled by a Level 3 order, and Lewisville may need to conduct discovery pursuant to the Texas Rules of Civil Procedure. TEX. R. CIV. P. 190.4.

III. VENUE

Venue properly exists in Travis County, Texas pursuant to TEXAS WATER CODE § 5.354 and TEXAS HEALTH & SAFETY CODE § 361.321.

IV. BACKGROUND

This lawsuit arises out of a decision by the Executive Director to approve the application for a modification submitted by City of Farmers Branch for Camelot Landfill MSW Permit No. 1312A to revise the facility's landfill cell dewatering plan and to update the facility's closure and post-closure care cost estimates. The site is located within the city limits of the City of Lewisville, Denton County, Texas, and directly affects the City of Lewisville. This lawsuit alleges and challenges that it is arbitrary and capricious for the Executive Director of the Texas Commission on Environmental Quality to approve this modification application.

V. PROCEDURAL BACKGROUND

The original application for this permit modification was submitted to the TCEQ October 13, 2014. Plaintiff submitted written comments March 12, 2015, opposing the issuance of the application. On April 24, 2015 the Executive Director of the Texas Commission on Environmental Quality issued his letter/notice that the Application had been approved effective April 15, 2015.

In accordance with 30 T.A.C. § 50.139 the City of Lewisville filed a Motion to Overturn requesting the Commission to review and overturn the Executive Director's decision. This Motion to Overturn was filed with the Chief Clerk of the TCEQ on May 15, 2015.

On June 8, 2015, the Commission's deadline to act on Lewisville's Motion to Overturn passed without further action by the Commission. Pursuant to 30 T.A.C. § 50.139(f), Lewisville's Motion to Overturn was "overruled by operation of law" due to the Commission's

inaction as of June 8, 2015.¹ Because Lewisville's Motion to Overturn was denied by operation of law pursuant to 30 T.A.C. § 50.139(f), a motion for rehearing is not required as a prerequisite for appeal to the district court. 30 T.A.C. § 50.139(g).

Lewisville has exhausted all its administrative remedies and is entitled to judicial review of the Executive Director's final approval of the Permit Modification. TEXAS WATER CODE § 5.351(b); TEX. GOV'T CODE § 2001.176(a).²

VI. PARTIES

The City of Lewisville, Plaintiff, is asking for judicial review of the TCEQ decision to approve this permit modification for Camelot Landfill. Camelot Landfill is an existing Type I Municipal Solid Waste Disposal facility, and is located at 580 Huffines Boulevard, City of Lewisville, Denton County, Texas 75056. In other words, the Camelot Landfill is located within the city limits of the City of Lewisville, Plaintiff. The City of Lewisville is an affected person by this decision of the TCEQ.

The Texas Commission on Environmental Quality, Defendant, is an agency of the State of Texas. Service on the Commission may be accomplished by delivering a copy of this instrument to Richard A. Hyde, P.E., Executive Director of the TCEQ at 12100 Park 35 Circle, Austin, Texas 78753.

¹ In a letter dated June 10, 2015, the Commission confirmed that Lewisville's Motion to Overturn was overruled by operation of law on June 8, 2015.

² From an abundance of caution, Lewisville filed an original appeal and petition on May 15, 2015 in order to comply with the 30-day deadline pursuant to TEXAS WATER CODE § 5.351 for appealing the Executive Director's final approval of the Permit Modification effective April 15, 2015. That appeal is docketed as Cause No. D-1-GN-15-001892. Lewisville files this original petition out of an abundance of caution to comply with the deadline pursuant to TEX. GOV'T CODE § 2001.176 for appealing the Executive Director's final approval of the Permit Modification within 30 days of the denial by operation of law of Lewisville's Motion to Overturn. For judicial efficiency, Lewisville will move to consolidate its two appeals of the Executive Director's final approval of the Permit Modification at a later date.

VII. COMMISSION ACTION ARBITRARY AND CAPRICIOUS

The ED of the TCEQ was arbitrary and capricious in its approval of this application. In accordance with 30 T.A.C. § 305.70(d), "permit and registration modifications apply to minor changes to an MSW facility or its operation that do not substantially alter the permit or registration conditions and do not reduce the capability of the facility to protect human health and the environment." This proposed modification has the potential to reduce the capability of the facility to protect human health and the environment in violation of the rules, by eliminating an opportunity to study potential problems within the current landfill that may impact human health and the environment. Furthermore, proceeding with this modification could have serious impacts on the pending permit amendment application. In the following paragraphs, we discuss several of the issues.

1. TCEQ Response to Comments

The TCEQ has provided responses to the comments submitted on March 12, 2015, on behalf of the City of Lewisville. Lewisville's comments addressed the permit modification submitted by the City of Farmers Branch to revise the facility's landfill cell dewatering plan and to update the facility's closure and post-closure care estimates. In response to the City of Lewisville's comment that the cell dewatering system should be processed with the pending major amendment, the TCEQ responded that the cell dewatering system is eligible to be processed as a modification because the proposed activity should not substantially alter the permit conditions or reduce the capability of the facility to protect human health and environment in accordance with 30 T.A.C. § 305.70(d). Quite the contrary; the basis for the modification is the newly disclosed phenomena of excavation heaving and related, but not investigated, seeps, deep into the Eagle Ford shale. This means that the Eagle Ford, once thought

to be impermeable here, has features that make it permeable, and granting the modification would pose a threat to human health and the environment by effectively concealing this problem. Covering this new problem without fully investigating its lateral extent, depth and effective permeability, as well as related problems is a reduction in environmental protection. Therefore this comment does not respond to the issue raised by the City of Lewisville that this portion of the landfill may offer geologic clues as to the current status of older section of the landfill that will be covered vertically in the expansion and the opportunity for remediation lost. This is a significant issue regarding the behavior of the Eagle Ford that may require a further measurement and study not a mere paragraph with no data.

In response to the City of Lewisville comment that there is no need to hurry this modification decision, the ED answers that "expediency is not an element that is required to be considered when determining a requested change is eligible to processed as a modification." But, a hearing on the permit amendment is imminent, there is no urgency to the minor modification request, and the issue of Eagle Ford character in this part of the landfill, and perhaps the entire landfill, is critical. Again this response does not answer the issue that certain pieces of information may be covered up by the proposed cell dewatering system which should be processed or should be studied during the major amendment process.

In response to comment number three which is that the geologic information could be lost regarding Eagle Ford formation that might affect TCEQ's decision on the major amendment application, the ED "relies on representations made in an application that are signed and sealed by a licensed professional engineer." Further information and scrutiny would only add to the safety of the landfill, and should not be brushed aside by arguing that the proposed revision to the cell dewatering system should not substantially alter the permit conditions or reduce the

capability of the facility to protect human health and the environment. Lewisville is deeply concerned about the underlying problem described by observations in the modification application preamble paragraphs.

As noted, the City of Lewisville has major concerns with the closure and post-closure costs aspects. The issue of seeps in the old landfill is a fundamental problem that must be addressed comprehensively. If in fact the seeps require further remediation, the costs could be significantly higher than that which has been estimated in this modification application.

2. Issues Regarding Modification Application 1312A

A. Excavation Heaving

In addition to this modification application, there is also an application pending for a permit amendment for this landfill (1312B). The pending amendment application vertical expansion is proposed to occur over the area where the present modification is proposed. The dewatering modification is to address and to allow a quick fix of a problem with excavation heaving in the Eagle Ford shale. That is, excavation into the Eagle Ford has resulted in heaving, cracks, fissures, and seeps that require detailed investigation. The problem with this approach is that this portion of the landfill, may offer geologic clues as to the current status of older sections of the landfill that will be covered vertically in the expansion. In other words the problem that has led to this request for a modification may be important as to whether the request for the amendment application should be granted or not. This new information about the behavior of the Eagle Ford raises a number of issues about important components of the amendment application that require measurement and study, not a single paragraph outlining the problem. Potential geologic evidence regarding the expansion should not be covered up with a modification that doesn't seek substantial information. This landfill modification activity should cease pending a

full evidentiary hearing on the safety of the continued expansion of the landfill, given this breach in the Eagle Ford shale which has heretofore been considered impermeable. Based on this information in the modification, the Eagle Ford is clearly not impermeable, a fact with all its implications that will be important in the weighing of the merits of the expansion.

B. Closure and Post Closure Costs

As noted, Lewisville also has major concerns about closure and post closure costs aspects associated with the modification. The issue of seeps in the old landfill and the source of the continued and expanding plume(s) of contamination emanating from the old landfill must be addressed comprehensively rather than in a modification. The costs of closure and post closure may be inaccurate based on the more thorough and searching information available in the contested case hearing for the permit amendment.

VIII. RELIEF

In conclusion, Plaintiff contends the decision of the Executive Director of the TCEQ to approve the modification application is fatally flawed and is arbitrary and capricious and not in accordance with the TCEQ rules for the reasons set forth herein.

Neither the facts nor the law support the final approval of the Permit Modification. The ED's final approval of the Permit Modification was invalid, arbitrary, and/or unreasonable.

Lewisville's substantial rights have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- in violation of a constitutional or statutory provision;
- in excess of the ED's and/or TCEQ's statutory authority;
- made through unlawful procedure;
- affected by other error of law;

- not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; and/or
- arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the Executive Director of the Commission be cited and required to appear herein, that a hearing be held, and that on final hearing hereof, Plaintiff has judgment of the Court as follows:

1. Reversing the decision of the Executive Director and remanding the matter back to the Commission for further proceedings; and
2. All other relief to which Plaintiff may be entitled.

Respectfully submitted,

BLACKBURN & CARTER, P.C.

by: /s/ James B. Blackburn, Jr.

James B. Blackburn, Jr.

TBN 02388500

Mary W. Carter

TBN 03926300

4709 Austin Street

Houston, Texas 77004

713/524-1012 (Tel.)

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Email: jbbblaw@blackburncarter.com

CERTIFICATE OF SERVICE

On this 17th day of June, 2015, the undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all attorneys/parties of record as indicated below.

/s/ James B. Blackburn, Jr.

James B. Blackburn, Jr.

FOR THE EXECUTIVE DIRECTOR:

Brian Christian, Director
Texas Commission on Environmental Quality
Small Business and Environmental Assistance
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Via Facsimile & U.S. First Class Mail

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FOR THE APPLICANT:

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FOR PUBLIC INTEREST COUNSEL:

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FOR THE CHIEF CLERK:

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INTERESTED PERSONS:

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CIVIL CASE INFORMATION SHEET

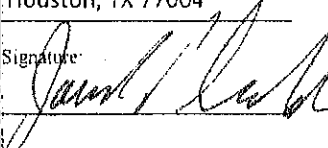
MAY ENTER CAUSE # / COURT # IF ALREADY ASSIGNED (E.G., FAMILY MOTION, AMENDED PETITION)

CAUSE NUMBER (FOR CLERK USE ONLY):

COURT (FOR CLERK USE ONLY):

SRYLED, City of Lewisville v. Texas Commission on Environmental Quality

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment petition for modification or motion for enforcement is filed in a family law case. The information should be the best available at the time of filing. This sheet, approved by the Texas Judicial Council, is intended to collect information that will be used for statistical purposes only. It neither replaces nor supplements the filings or service of pleading or other documents as required by law or rule. The sheet does not constitute a discovery request, response, or supplementation, and it is not admissible at trial.

1. Contact information for person completing case information sheet:		Names of parties in case:	Person or entity completing sheet is:
Name:	Email:	Plaintiff(s)/Petitioner(s):	<input checked="" type="checkbox"/> Attorney for Plaintiff/Petitioner
James B. Blackburn, Jr.	jbblaw@blackburncarter.com	City of Lewisville	<input type="checkbox"/> Pro Se Plaintiff/Petitioner
Address:	Telephone:	Defendant(s)/Respondent(s):	<input type="checkbox"/> Title IV-D Agency
4709 Austin Street	(713) 524-1012	Texas Commission on	<input type="checkbox"/> Other:
City/State/Zip:	Fax:	Environmental Quality	Additional Parties in Child Support Case:
Houston, TX 77004	(713) 524-5165		Custodial Parent:
Signature:	State Bar No:		Non-Custodial Parent:
	0238850		Presumed Father:
		(Attach additional page as necessary to list all parties)	

2. Indicate case type, or identify the most important issue in the case (select only 1):OPTION A: CK CASE TYPE (EXCEPT OTHER) FOR CLERK TO SELECT SUIT TYPE; SEE SEC. 3 NOTE BELOW *Civil**Family Law*

Contract	Injury or Damage	Real Property	Marriage Relationship	Post-judgment Actions (non-Title IV-D)
<input type="checkbox"/> Debt/Contract <input type="checkbox"/> Consumer/DTPA <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Other Debt/Contract: <input type="checkbox"/> Foreclosure <input type="checkbox"/> Home Equity—Expedited <input type="checkbox"/> Other Foreclosure <input type="checkbox"/> Franchise <input type="checkbox"/> Insurance <input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Non-Competition <input type="checkbox"/> Partnership <input type="checkbox"/> Other Contract:	<input type="checkbox"/> Assault/Battery <input type="checkbox"/> Construction <input type="checkbox"/> Defamation <input type="checkbox"/> Malpractice <input type="checkbox"/> Accounting <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional Liability: <input type="checkbox"/> Motor Vehicle Accident <input type="checkbox"/> Premises <input type="checkbox"/> Product Liability <input type="checkbox"/> Asbestos/Silica <input type="checkbox"/> Other Product Liability List Product: <input type="checkbox"/> Other Injury or Damage:	<input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Trespass to Try Title <input type="checkbox"/> Other Property: Related to Criminal Matters <input type="checkbox"/> Expunction <input type="checkbox"/> Judgment Nisi <input type="checkbox"/> Non-Disclosure <input type="checkbox"/> Seizure/Forfeiture <input type="checkbox"/> Writ of Habeas Corpus—Pre-indictment <input type="checkbox"/> Other:	<input type="checkbox"/> Annulment <input type="checkbox"/> Declare Marriage Void Divorce <input type="checkbox"/> With Children <input type="checkbox"/> No Children Other Family Law <input type="checkbox"/> Enforce Foreign Judgment <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Name Change <input type="checkbox"/> Protective Order <input type="checkbox"/> Removal of Disabilities of Minority <input type="checkbox"/> Other:	<input type="checkbox"/> Enforcement <input type="checkbox"/> Modification—Custody <input type="checkbox"/> Modification—Other Title IV-D <input type="checkbox"/> Enforcement/Modification <input type="checkbox"/> Paternity <input type="checkbox"/> Reciprocity (UIFSA) <input type="checkbox"/> Support Order Parent-Child Relationship <input type="checkbox"/> Adoption/Adoption with Termination <input type="checkbox"/> Child Protection <input type="checkbox"/> Child Support <input type="checkbox"/> Custody or Visitation <input type="checkbox"/> Gestational Parenting <input type="checkbox"/> Grandparent Access <input type="checkbox"/> Parentage/Paternity <input type="checkbox"/> Termination of Parental Rights <input type="checkbox"/> Other Parent-Child:
Employment	Other Civil			
<input type="checkbox"/> Discrimination <input type="checkbox"/> Retaliation <input type="checkbox"/> Termination <input type="checkbox"/> Workers' Compensation <input type="checkbox"/> Other Employment:	<input checked="" type="checkbox"/> Administrative Appeal <input type="checkbox"/> Antitrust/Unfair Competition <input type="checkbox"/> Code Violations <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Intellectual Property <input type="checkbox"/> Lawyer Discipline <input type="checkbox"/> Perpetrate Testimony <input type="checkbox"/> Securities/Stock <input type="checkbox"/> Tortious Interference <input type="checkbox"/> Other:			
Tax	Probate & Mental Health			
<input type="checkbox"/> Tax Appraisal <input type="checkbox"/> Tax Delinquency <input type="checkbox"/> Other Tax	Probate/Wills/Intestate Administration <input type="checkbox"/> Dependent Administration <input type="checkbox"/> Independent Administration <input type="checkbox"/> Other Estate Proceedings <input type="checkbox"/> Guardianship—Adult <input type="checkbox"/> Guardianship—Minor <input type="checkbox"/> Mental Health <input type="checkbox"/> Other:			

3. Indicate procedure or remedy, if applicable (may select more than 1):

<input type="checkbox"/> Appeal from Municipal or Justice Court <input type="checkbox"/> Arbitration-related <input type="checkbox"/> Attachment <input type="checkbox"/> Bill of Review <input type="checkbox"/> Certiorari <input type="checkbox"/> Class Action	<input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Garnishment <input type="checkbox"/> Interpleader <input type="checkbox"/> License <input type="checkbox"/> Mandamus <input type="checkbox"/> Post-judgment	<input type="checkbox"/> Prejudgment Remedy <input type="checkbox"/> Protective Order <input type="checkbox"/> Receiver <input type="checkbox"/> Sequestration <input type="checkbox"/> Temporary Restraining Order/Injunction <input type="checkbox"/> Turnover
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OPTION C: SECTION 3 PROCEDURES/REMEDIES IN BOLD MAY BE USED AS CASE OR SUIT TYPES. YOU MAY SPECIFY THAT ONE OF THESE PROCEDURES/REMEDIES BE USED AS A SUIT TYPE BY CHECKING IT AND LEAVING THE CASE TYPE IN SECTION 2 BLANK. SELECTING A CASE TYPE IN SECTION 2 OVERRIDES ANY SELECTION IN SECTION 3.

BLACKBURN & CARTER

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2015 JUN 18 AM 8:00

CHIEF CLERKS OFFICE

FAX TRANSMITTAL SHEET

CONFIDENTIAL: THIS MESSAGE IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED. THIS MESSAGE CONTAINS INFORMATION FROM THE LAW FIRM OF BLACKBURN CARTER, P.C. WHICH MAY BE **PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW.** IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE, OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY AT OUR TELEPHONE NUMBER ABOVE. WE WILL PROMPTLY ARRANGE FOR THE RETURN OF THIS MESSAGE TO US AT NO INCONVENIENCE TO YOU.

Date: June 17, 2015From: James B. Blackburn, Jr.
BLACKBURN CARTER, P.C.Sent by: ZAClient/Matter: City of Lewisville - Farmers Branch/Camelot LandfillNo. of Pages Including the Cover Sheet: 10 / 3

TO:	FAX NO.:	TIME:
Brian Christian, Director/TCEQ	(512) 239-5678	
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Gary D. Greer, City Manager City of Farmers Branch	(972) 919-2514	
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Bill Johnson Leonard Martin, City Manager Jack Powers Celina Romero John and Julie Wehlage Julia Wehlage, Chairman	Regular Mail	

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The original of this transmittal, or a copy thereof, is being forwarded to you by mail or special delivery.

Message: Attached is a courtesy copy of Plaintiff's Original Petition

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Telephone: (713) 524-1012

Telecopier: (713) 524-5165

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JAMES B. BLACKBURN, JR.

MARY W. CARTER

June 17, 2015

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Re: *City of Lewisville v. Texas Commission on Environmental Quality*; In the District
Court of Travis County, Texas

Dear All:

Enclosed please find a copy of *Plaintiff's Original Petition* electronically filed today in
connection with the above referenced matter.

Should you have any questions or concerns regarding this filing, counsel can be reached
at (713) 524-1012.

June 17, 2015

Page 2

Sincerely,

BLACKBURN CARTER, P.C.

by Zona Amerson
Zona Amerson – Legal Assistant

cc: Via U.S. First Class Mail:

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